

Section II. (REMARKS)**Election of Group I Claims 1-25 and 37-39 and Traverse Thereof**

In the February 24, 2005 Office Action, the Examiner imposed a restriction requirement against the originally filed claims 1-39, as between:

Group I. Claims 1-25 and 37-39; and

Group II. Claims 26-36.

Applicants hereby elect, with express traverse, Group I claims 1-25 and 37-39.

In the February 24, 2005 Office Action, the Examiner asserted that the inventions defined by Groups I and II claims relate to process of making and product made, and that such inventions are distinct because the process defined by Group II claims 26-36 can make a plurality of other sensors for performing different type of functions such as sensor for determining velocity, displacement or acceleration.

Applicants respectfully disagree with the Examiner.

Claim 26, from which claims 27-35 depend, expressly requires deposition of "a gas sensing material" and formation of "a free-standing gas sensing element." Claim 36 expressly recites the steps of "depositing a gas sensing material on the protruding support structure" and "forming the free-standing gas sensing element."

Such express requirements and recitation by claims 26-36 clearly define processes for making only gas sensors, which are NOT suitable for determining velocity, displacement or acceleration, despite the Examiner's assertion.

The Examiner's assertion that the processes defined by Group II claims 26-36 can make other sensors for determining velocity, displacement or acceleration therefore improperly ignores the express requirements and recitation by claims 27-35.

Further, such assertion by the Examiner is not support by any substantive evidence, except for the Examiner's broad conclusive statement. It has been well established that mere denials and conclusory statements are not sufficient to establish a genuine issue of material fact. *In re Dembiczak*, 50 USPQ2d 1614 (Fed. Cir. 1999), citing *McElmurry v. Arkansas Power & Light Co.*, 27 USPQ2d 1129 (Fed. Cir. 1993).

Therefore, such assertion by the Examiner cannot be used to support the restriction requirement.

Moreover, there is appropriate nexus between the Group I product claims and the Group II method-of-making claims. Specifically, the Group II method claim 26, from which claims 27-35 depend, and the Group II method claim 36 both recite all the limitations of the Group I product claim 12. Therefore, the Group I product claims and the Group II method-of-making claims are interrelated to one another, and their relationship is sufficiently close to justify the maintenance of all product and method claims in the present application for search and examination purposes.

The interdependence of the product and method aspects of the present invention is confirmed -- indeed, it is mandated -- by virtue of the fact that the description requirements of 35 U.S.C. §112 compel disclosure of both aspects of the invention in the one application which Applicants have filed.

In addition, the courts have recognized that it is in the public interest to permit applicants to claim several aspects of their invention together in one application, as the applicants have done herein. The CCPA has observed:

We believe the constitutional purpose of the patent system is promoted by encouraging applicants to claim, and therefore to describe in the manner required by 35 U.S.C. §112 all aspects as to what they regard as their invention, regardless of the number of statutory classes involved. *In re Kuehl*, 456 F.2d 658, 666, 117 U.S.P.Q. 250, 256 (CCPA 1973).

This interest is consistent with the practical reality that a sufficiently detailed disclosure supporting claims to one aspect of an invention customarily is sufficient to support claims in the same application to other aspects of the invention.

Applicants respectfully suggest that in view of the continued increase of official fees and the potential limitation of an applicant's financial resources, a practice which arbitrarily imposes restriction requirements may become prohibitive and thereby contravene the constitutional purpose to promote and encourage the progress of science and the useful arts.

All these considerations indicate that the imposition of a restriction requirement with inadequate authority can lead to situations in which an applicant's legitimate patent rights are exposed to uncertainty and even extinguished. Accordingly, to protect a patentee's rights and to serve the public's interest, the Examiner should not require restriction in cases such as the present application wherein various aspects of a unitary invention are claimed.

For the above reasons, Applicants respectfully request that the Examiner withdraw the restriction requirement and examine all of the aspects of the present invention embodied in claims 1-39.

Amendments of Group II Claims 26 and 36 for Future Rejoinder

MPEP §821.04 expressly provides that when the application as originally filed discloses a product and the process for making and/or using such product, and only claims directed to the product are presented for examination, when a product claim is found allowable, applicant may present claims directed to the process of making and/or using the patentable product for examination through the rejoinder procedure, provided that the process claims depend from or include all the limitations of the allowed product claims.

Applicants hereby manifest the intent to rejoin the withdrawn Group II method claims 26-36 at a future time under MPEP §821.04, when the elected Group I product claim 12 are determined to be allowable.

Consistent with such intent to rejoin, Applicants have maintained the method claims 26-36 without cancellation and further amended such claims, notwithstanding the Examiner's withdrawal of such claims, to present them in form suitable for future examination upon their rejoinder with the allowed product claims.

Applicants hereby request the Examiner not to cancel the withdrawn Group II method claims 26-36 during the prosecution of the present application and to take up such withdrawn method claims for examination when the product claim 12 is allowed.

Alternatively, if the rejoinder of withdrawn claims 26-36 is denied, despite the proper basis in the MPEP therefor, Applicants hereby reserve the right to file divisional application(s) directed to the subject matter of such withdrawn claims under 35 U.S.C. 121.

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